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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 865

LEVITT AND SONS, INCORPORATED,
Appellant,

vs.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES and FRANKLIN D. TODD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS ON BEHALF OF DIVISION AGAINST DISCRIMINATION, APPELLEE

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

Motion to Dismiss

Pursuant to Rule 16, paragraphs 1(a) and 1(b), of the Revised Rules of this Court, the appellee, Division Against Discrimination, an agency within the Department of Education, State of New Jersey, moves to dismiss the appeal of Levitt and Sons, Incorporated, on the ground that such appeal is not from a final judgment or decree in the State proceedings and on the further grounds that the appellant does not present a substantial federal question; that the question concerning vagueness in violation of the Fourteenth Amendment was not properly raised before or passed upon by the Supreme Court of New Jersey, and that the appellant lacks standing to raise this question concerning the Due Process clause of the Fourteenth Amendment.

Statement

This is a Motion to Dismiss both an appeal allegedly within this Court's jurisdiction by reason of 28 U.S.C. §1257(2) and an alternative request for a writ of certiorari, by reason of 28 U.S.C. §2103. Levitt & Sons, Incorporated appeals a decision of the Supreme Court of New Jersey in a proceeding brought before that court as an appeal from an interlocutory order of a state administrative agency.

The Division Against Discrimination will rely in part upon the Statement of Facts and History of Litigation contained in the Jurisdictional Statement filed by Levitt with this Court on April 15, 1960, and received by the Division on April 18, 1960. It joins in the Motion to Dismiss, filed by the appellees, Willie R. James and Franklin D. Todd, on May 16, 1960. The Division will supplement the history of this litigation to the extent necessary for the purposes of its Motion to Dismiss.

The Supreme Court of New Jersey has resolved that under New Jersey law, N.J.S.A. 18:25-4, 5(k), Levitt is engaged in the business of building publicly assisted housing in Levittown, New Jersey (Jurisdictional Statement p. 13a). The Court found it immaterial whether or not Levitt received its moneys directly from the State or from the Federal government since it was materially assisted by the federal government through the FHA program. It also noted by way of dicta that there "is much persuasive force in the argument" that Levitt's housing was in fact "financed" by public assistance, thus bringing Levitt within the terms of the statutory definition. N.J.S.A. 18:25-5 (k). (Jurisdictional Statement p. 9a).

Because of the unique procedural history of the present case, it is necessary to review past proceedings in order to shed light on the question of the finality of the judgment

under review. There has never been a factual hearing upon the substantive issue of racial discrimination by Levitt nor has the Division had occasion to order specific "affirmative action" available to the complainants as a redress for their alleged wrongs suffered. N.J.S.A. 18:25-17.

The present litigation on appeal was initiated by James and Todtl by complaints filed with the Division against Levitt, claiming wrongful discriminatory treatment in the offerings for sale of publicly assisted housing in the summer of 1958. N.J.S.A. 18:25-13. The Division conducted and completed an investigation of the facts alleged in these complaints, terminating in an administrative finding of "probable cause". N.J.S.A. 18:25-14, which was not appealed. Cf. *Revised Rules of the Supreme Court of New Jersey*, 4:88-8(b). After this finding the present parties participated in conciliatory and persuasory proceedings in an attempt to dispose amicably of the controversy, N.J.S.A. 18:25-14; these attempts were of no avail. Levitt and the complainants were thereupon given notice of a public hearing which was to have been held, after an adjournment, on December 15, 1958. N.J.S.A. 18:25-15.

Three days prior to this scheduled hearing, Levitt commenced an action in the Law Division of the Superior Court in lieu of the extraordinary legal remedy of *certiorari*. *Revised Rules of the Supreme Court of New Jersey*, 4:88 *et seq.* In this proceeding it secured a temporary restraint against the agency hearings. The Law Division ultimately dismissed this action in lieu of prerogative writ on February 16, 1959, because of lack of jurisdiction under New Jersey law and because of Levitt's failure to exhaust administrative remedies (Appendix A-1).

Upon Levitt's appeal of the dismissal to the Appellate Division of the Superior Court, that court, in view of the issues raised as to the applicability and constitutionality

of the Law, on its own motion and with the consent of the parties, treated the Notice of Appeal as a Motion for Leave to Appeal an interlocutory order of an administrative agency, i.e., the order for public hearings by the Division. *Rules of Practice of the Supreme Court of New Jersey*, 1:27A-2(a) (1969 Edition) (Appendix A-2). The court decided to consider the stayed legal issues raised in the prerogative writ action on their merits and left no question in treating the matter as an interlocutory appeal, that the litigation before the court was to one first started in the Division. The court [illegible] by way of affirming the dismissal for [illegible] Division but failed to require that [illegible] administrative remedies before filing [illegible] legal questions. The sole action before the Court was, by way of interlocutory appeal, the controversy [illegible]. The Appellate Division remanded the case [illegible] agency for further proceedings on July 22, 1970 [illegible] the essential legal questions [illegible] (Supplemental Statement p. 39a).

After motions for [illegible] denied a rehearing before the Appellate Division, they appealed to the Supreme Court of New Jersey. The respondent Division moved: 1) to stay the consideration of the appeal because of its interlocutory nature and 2) to allow immediate administrative proceedings before the Division (Appendix B). The New Jersey Supreme Court granted the second portion of the motion but denied that it would consider the legal issues in the interlocutory appeal upon an accelerated time schedule (Appendix C).

While there has not been a hearing upon the substantive issue of racial discrimination, by Stipulation of the attorneys for [illegible] and individual appellees and the Attorney General of New Jersey for the Division,

(Motion to Dismiss by Individual Appellees p. 1a), the need for such hearing was obviated. However, this Stipulation did not purport to resolve finally the controversy over the specific remedy, if any, to be afforded the individual appellees. It was agreed that an Order was to be entered by the Division, in the event the New Jersey Supreme Court affirmed the decision of the Appellate Division, at the time the former court issued its mandate. *Revised Rules of the Supreme Court of New Jersey*, 1:2-1. This Order is to provide, *inter alia*, that Levitt sell each complainant a publicly assisted house in Levittown without racial discrimination, upon the same terms, conditions and financial arrangements as were utilized in the manner of 1958 (Motion to Dismiss by individual appellees pp. 2a-3a). Substantial jurisdiction was retained in the Division "to supervise compliance with the provisions" of the Order, since the terms thereof are phrased only generally and do not specify the particular formula for compliance. The Division in effect, has reserved the right to approve the manner of compliance chosen by Levitt.

After the New Jersey Supreme Court's decision upon the interlocutory appeal, Levitt's Notice of Appeal to the United States Supreme Court was filed on February 11, 1960, and the New Jersey court on its own motion withheld the issuance of its mandate on February 15, 1960, for sixty days (Appendix D). In April, 1960, that Court upon the motion of Levitt (Appendix D) again refrained from issuing the mandate until June 30, 1960 (Appendix F). Thus, the initial machinery provided for in the stipulated Order has not been put in motion and the substantial questions arising because of the limitation of the proposed Consent Order remain a real possibility.

POINT I

The present appeal should be dismissed as premature; the decision of the Supreme Court of New Jersey is not a final judgment or decree.

The individual appellees concede the finality of the judgment upon appeal. (Motion to Dismiss by individual appellees p. 4, fn. 2); the appellant avoids this question regarding the Court's jurisdiction, stating that the New Jersey Supreme Court "is the highest state court available" but not mentioning why for this litigation it is the last court available (Jurisdictional Statement, p. 1).

The Congressional limitations and this Court's own self abstaining practice in allowing an appeal from State litigation firmly established that there must be a final judgment or decree. 28 U.S.C., 1257. Concerning another State administrative proceeding, *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62; 68 S. Ct. 972; 92 L. Ed. 1212 (1948), Mr. Justice FRANKFURTER stated in this regard:

> "Close observations of this limitation upon the Court is not required for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations." 334 U. S. at 67.

The Division believes that the present litigation falls directly in line with the theory and principles of the *Republic* decision and cases cited therein concerning the lack of requisite finality to justify review of State litigation.

The Division has retained substantial jurisdiction to supervise compliance with the general plan agreed upon by the parties as a means of terminating the controversy. This retention was necessary and involved by no means ministerial duties, as was also the case in the jurisdiction

retained by the State agency in the order of the Oklahoma Corporation Commission. 334 U. S. at 66. Because the present Consent Order does not purport to define specifically or particularize the manner and means of compliance, this controversy is potentially incomplete. Until the parties have agreed upon the precise avenue of compliance that will be utilized with the approval of the Division, or the Division has interceded to settle any question that may arise (and perhaps even order a specific mode of compliance), a real possibility exists of further controversy giving rise to the consequent danger of more federal questions in this litigation.

In State administration proceedings, even though the major issues of the existence of liability or the status of a litigant under the law have been authoritatively determined, the litigation is not final when there are further related questions to be determined by a subordinate court. *Republic Natural Gas Co.* v. *Oklahoma*, *supra*, 334 U. S. at 70; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143; 59 S. Ct. 754, 763; 83 L. Ed. 1147, 1159 (1939). The questions that may arise in the implementation of the general terms of the Order would involve more than a ministerial application of legal issues already decided. *Cf. Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 73; 67 S. Ct. 156, 158; 91 L. Ed. 80, 87 (1946). Since these complaints essentially concern equal treatment among the races, especially as shall be afforded the individual appellees, in the sale of publicly assisted housing, the relief that is to be afforded these parties cannot be considered a severed controversy. *Cf. Radio Station WOW* v. *Johnson*, 326 U. S. 120, 126; 65 S. Ct. 1475, 1479; 89 L. Ed. 2092, 2099 (1945).

Prior to the execution of a stipulation in this case, all parties had the right to a full hearing upon the sub-

stantive question of racial discrimination and upon the related issue of the particular relief that would be afforded, if any. The Division's determination of these issues was subject to appeal, N.J.S.A. 18:25-21, and modification by the reviewing court, if necessary. N.J.S.A. 18:25-23. Had such an appeal been taken, because of the form or content of the Division's order, there would have been ample staying powers in the New Jersey appellate courts to guard against any irreparable injury to the appellant. *Revised Rules of the Supreme Court of New Jersey*, 1:4-6, 7:2:4-3. The order requiring a contract for the sale of property was a voluntary one and the execution of this Order will not effectively abrogate any asserted federal right, destroying the appellant's rights if successful upon the federal questions. *Cf. Forgay* v. *Conrad*, 47 U. S. (6 How.) 201, 204; 12 L. Ed. 404, 405 (1848). The Consent Order will merely require non-discriminatory treatment to prospective purchasers at Levittown, for so long as the Law Against Discrimination is held and a contract of sale with the complainants constitutional an obligation Levitt freely assumed. The essential controversy concerns the obligation of Levitt and the rights of the complainants under the Law Against Discrimination, and the relationship of each is essentially tied to the other. Compare *Forgay* v. *Conrad*, *supra*; *Radio Station WOW* v. *Johnson*, *supra*, with *Washington ex rel. Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 37 S. Ct. 295; 61 L. Ed. 702 and cases cited therein. Levitt's only immediate obligation to the individual appellees is not a severable one from the entire controversy, but one it freely assumed prior to the termination of the entire case in order to avoid a full administrative hearing and resulting order.

Until the parties have determined the conditions, terms, financial arrangements and even the non-discriminatory selection of a house in Levittown, there remains a substan-

tial portion of the entire controversy subject to dispute. In case of dispute, the Division's function will call for expert judgment, and the action taken by the Division in supervising full compliance with the Consent Order will be more than a ministerial task. Appellant has not borne the burden of establishing the finality of this judgment, and as long as there remains doubt as to such finality, the appeal should be dismissed as premature. *Republic Natural Gas Co. v. Oklahoma, supra.*

POINT II

This appeal does not raise any substantial Federal question.

A. There is no conflict between the New Jersey Law Against Discrimination and federal policy.

We join in that portion of the Motion and brief of the individual appellees treating the constitutionality of the housing provisions of the New Jersey Law Against Discrimination in relation to the Supremacy Clause, Article VI, Clause 2, of the United States Constitution (Motion to Dismiss by individual appellees Point II, page 10). To avoid repetition we shall not set forth extensive argument concerning the line of authority represented by *Huron Portland Cement Co. v. Detroit*, 28 U. S. L. W. 4269, 4271 (April 25, 1960), and *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942). *See* also *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515; 89 L. Ed. 1915 (1945); *Auto Workers v. Wisconsin Bd.*, 336 U. S. 245; 69 S. Ct. 516; 93 L. Ed. 651 (1949); *Reagan v. Mercantile Trust Co.*, 154 U. S. 413 14 S. Ct. 1060; 38 L. Ed. 1028 (1894). The Court has established clearly that it will not find a State statute repugnant to federal policy or Congressional fiat unless the latter is expressly stated.

For this reason we submit that appellant's argument is contrary to firmly established principle and reveals total lack of substance to the federal question raised. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308; 23 S. Ct. 123; 47 L. Ed. 159.

The New Jersey Constitution, Art. I, Section 5, provides:

> "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

Long before the provisions under review giving enforcement powers to the Division over racial discrimination in housing were enacted, the New Jersey courts declared unlawful racial discrimination in public housing. *Seawell v. MacKithen*, 2 N. J. Super. 255 (Ch. Div. 1949), *rev'd on other grds.*, 3 N. J. 563 (1949); *Taylor v. Leonard*, 30 N. J. Super. 116 (Ch. Div. 1954); *Racial Discrimination in Housing*, Note, 107 U. of P. Law Rev., 515, 517 (1959). The policy of prohibiting racial discrimination in public housing in New Jersey has been an important and long-standing one; the Court, in the *Taylor* case, stated:

> "The eventual survival of any form of government necessarily depends on the equal apportionment of the rights and privileges of citizenship as well as its obligation and duties among all its citizens irrespective of race, color or creed. Such a principle has long since been the keystone of our national and state form of government."

In enacting the Law Against Discrimination, the New Jersey Legislature utilized language similar to the court's as the basis for such legislation. N.J.S.A. 18:25-2, 3.

Federal policy in this regard has been no less consistent. Whenever a person receives the benefits of funds and assistance derived from all people there is strong public policy dictating that such benefits be available for the good of all persons without racial discrimination. See *Hayward v. P.H.A.*, 238 F. 2d 689, 696 (5 Cir. 1956); *Detroit Housing Commission* v. *Lewis*, 226 F. 2d 180 (6th Cir. 1955); *Askew v. Benton Harbor Housing Commission* (not officially reported), 2 Race Rel. L. Rep. 611 (D. C. Mich. 1956); *Davis v. St. Louis Housing Authority* (not officially reported), 1 Race Rel. L. Rep. 353 (D. C. Mo. 1955); *Jones v. City of Hamtramck*, 121 F. Supp. 123, 124 (D. C. Mich. 1954); *Lann v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210, 212 (D. C. Ohio 1953). This Court's recognition of the validity of anti-discrimination laws is in accord and reveals the lack of substance to any claim of a violation of Congressional policy or conflict with the Supremacy Clauses of the United States Constitution. See *Railway Mail Ass'n. v. Corsi*, 326 U. S. 88; 65 S. Ct. 1483; 89 L. Ed. 2072 (1945); *Hob-Lo Excursion Co. v. Michigan*, 333 U. S. 28; 68 S. Ct. 358; 92 L. Ed. 455 (1948). See also VI N. Y. Law Forum 38, Forster and Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing* (1960).

The case of *Johnson v. Levitt & Sons, Inc.*, 131 F. Supp. 114 (D. C. Pa. 1955) is not in conflict with state regulation of racial discrimination in federally assisted housing projects. The court considered the procedural question of a right of action against racial discrimination in public housing in federal court and stated:

> "The extent of the plaintiffs' rights and whether or not they are being violated by the defendants are questions not involved in this motion. The only question is whether the plaintiffs' action can be maintained in this court. Any remedy which they may have in the courts of Pennsylvania is not affected."

The appellant argues that there is a Congressional preemption in the National Housing Act of 1934, 12 U.S.C. §1701 *et seq.*, 48 Stat. 1246, discernible only by implication, concerning the subject of racial discrimination. Congressional silence in this area would thus be construed to conflict with the many regulations of the Federal Housing Administration against racial covenants in properties assisted by it. 24 C.F.R., §§231.16, 241.16, 243.19, 243.21, 243.29, 221.29, 221.34, 221.40, 203.19, 203.24 and 203.29. This same Congressional omission would apparently conflict with §601 of the National Housing Act, 28 U.S.C., §1750aa which provides:

> "It is declared to be the policy of Congress:"
>
> (a) to seek the constant improvement of the living conditions of all the people under a strong, free, competent economy, and to take such action as will facilitate the operation of that economy to provide adequate housing for all the people . . ."

This statement is perhaps the only expression of Congressional policy that has bearing on the subject; it does not purport to remove from the States their police power to enact laws concerning racial discrimination for the safety, health and morals of the people within their boundaries.

If the appellant's argument was logically valid, 28 U. S. C., §1703, concerning eligible financial institutions, would necessarily be construed to remove all state control from those institutions subject to F.H.A. assistance inasmuch

as and to the extent that the National Housing Act has prescribed minimum qualifications to act under the F.H.A. program. Beside the many necessary State laws designed to regulate these agencies coordinately with federal law, New Jersey has legislation against racial discrimination committed by these same financial institutions. N.J.S.A. 17:34-44, 45; N.J.S.A. 17:19A-69; N.J.S.A. 17:12A-78. Clearly, appellant's argument calls for incongruous results. Additionally, state courts have found a clear Congressional intent to allow local regulation in the absence of an express conflict with federal policy, even in areas dealt with by Congress. *Stuyvesant Town v. Lighaw*, 17 N. J. 473 (1955). *Northridge Coop. Sec. No. 1 v. 32nd Ave. Const. Corp.*, 2 N. Y. 2d 214, 141 N. E. 2d 802 (1957).

The appellant's argument concerning Congressional intent by omission is not supported by the cases cited. *American Bridge Co. v. Smith*, 352 Mo. 616, 179 S. W. 2d 12 (Sup. Ct. Mo. 1944), cert. den. 323 U. S. 712 (1944) concerns a state court's construction of an express state statute. *Western Union Tel. Co. v. Lenroot*, 323 U. S. 490, 65 S. Ct. 335, 89 L. Ed. 414 (1945) dealt with the proper interpretation of Congressional language actually included in the law after the act had been subject to numerous changes in the legislative process. *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d, 541 (1949), cert. den. 339 U. S. 981 (1950) again only concerned a state court's construction of a state law, and the reasoning therein as related to the National Housing Act would imply that, since Congress has not acted in this field, it has left such regulation concerning racial discrimination to the states. The obvious difference with *Dorsey* and this situation is that failure of state legislation results in no regulation but a failure of federal legislation leaves open the area for otherwise valid State law.

Levitt's argument as to the effect of Congressional failure to approve suggested amendments to the National Housing Act prohibiting racial discrimination is without legal basis. The failure of Congressional adoption in this regard is more properly evidence of a Congressional intent to leave such regulation to the states than an implication that Congress intended to remove from the states the power to act in an area where the federal legislature has not acted. See II Emerson & Haber, *Political and Civil Rights in the United States*, 1238-1239, fn. 13. Such negative legislation as suggested by the appellant would impliedly remove from State police powers the right to act in any area where Congress has failed to act after legislation has been offered.

Resort to legislative history is properly invoked only when the statute in question is ambiguous. Examination of the entire National Housing Act of 1934, as amended, even in light of abortive attempts to amend this act to include prohibitions against racial discrimination, does not reveal any federal policy to restrict state action. Attempted amendments to the 1934 law in the years, 1953—1956, are no part of the legislative history of the entire act. *Labor Board* v. *Lion Oil Co.*, 352 U. S. 282, 291; 77 S. Ct. 330, 335; 1 L. Ed. 2d 331, 338 (1957). To require such a prohibition against state action "would produce incongruous results" and thus should be avoided. 352 U. S. 288. FHA has consistently interpreted the law that housing projects built pursuant to its program, are subject to local regulation and specifically has interpreted the National Housing Act as requiring observance of local anti-discrimination laws. (Jurisdictional Statement p. 7; FHA Form No. 2201-G). This Court declared in *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; 51 S. Ct. 144, 145; 75 L. Ed. 397, 399 (1931) that "contemporaneous construction by those charged with the administration of the act * * * are * * * entitled to respectful consideration, and will not

be overruled except for weighty reasons." The Court has also recognized that no inference should be drawn from incomplete and indecisive steps in the legislative process, since this would be engaging in "speculative unrealities". *Helvering* v. *Hallock*, 309 U. S. 106, 119-121; 60 S. Ct. 444, 451; 84 L. Ed. 604, 612 (1940). Therefore, the premise upon which the appellant bases its alleged federal questions is without support.

There is no attempt in the New Jersey law to regulate the United States or any federal agency. The law is directed solely against persons selling or operating publicly assisted housing accommodations within the State. The exercise of State's police power in this regard is similar to State regulation of any instrumentality doing business with or assisted by the federal government. *Reagan* v. *Mercantile Trust Co., supra; Davis* v. *Elmira Savings Bank*, 161 U. S. 275; 16 S. Ct. 502; 40 L. Ed. 700 (1896); *National Bank* v. *Commonwealth*, 76 U. S. (9 Wall) 353; 19 L. Ed 701 (1869); *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261; 63 S. Ct. 617; 87 L. Ed. 748 (1943).

We, therefore, respectfully submit that appellants have failed to show any Congressional policy in this field; that the local regulations in no way restricts or conflicts with the national housing program adopted by Congress, nor does the New Jersey law attempt to regulate or impose requirements upon a federal agency. Therefore, the question concerning the Supremacy Clause of the United States Constitution is not substantial and should be dismissed. *Palmer Oil Corp.* v. *Amerada Corp.*, 343 U. S. 390 72 S. Ct. 842; 76 L. Ed. 1022 (1952).

B. Appellant's argument that the Law Against Discrimination is vague and indefinite, contrary to the Fourteenth Amendment does not raise a substantial Federal question.

The Division joins in Point III of the Motion and brief of the individual appellees, (Motion to Dismiss by individual appellees pp. 16-20) and will rely upon the arguments presented therein. The Division also is in accord with Point I raised by the individual appellees in this Motion and brief, to the effect that Levitt's claim of "indefiniteness" has not been properly raised before the New Jersey Supreme Court nor has that court expressly ruled upon the issue. (Motion to Dismiss by individual appellees pp. 5 to 10). (See also Appendix G.)

It is well established that before a federal question will be considered by the United States Supreme Court, that question must have been properly raised, according to the state procedure, before the highest court of the state. *Radio Station WOW v. Johnson, supra; Herndon v. Georgia*, 295 U. S. 441, 443; 55 S. Ct. 794, 795; 79 L. Ed. 1530, 1532 (1935); *American Surety Co. v. Baldwin*, 287 U. S. 156, 162-164, 53 S. Ct. 98; 77 L. Ed. 231 (1932). The test invoked for consideration by this court is that any federal question must be considered and disposed of by the state's highest court in a manner that constituted more than just a bare denial of rehearing. *Consolidated Turnpike v. Norfolk*, 228 U. S. 326, 334; 33 S. Ct. 510, 513; 57 L. Ed. 857, 862 (1913).

As is well illustrated by the individual appellees in this brief, the interpretation of N.J.S.A. 18:25-1, 5(k) and 9d by the New Jersey Supreme Court is precisely the construction advocated by all appellees throughout the entire controversy, and the same that was declared by the Appellate Division earlier in the litigation (Jurisdictional Statement

pp. 32a to 33a). This construction of the statutory definition of what the term publicly assisted housing "shall include" was clearly foreseeable by reason of the earlier New Jersey decision interpreting the penal New Jersey Civil Rights Law, R.S. 10:1-1 *et seq.* which contains almost identical language. In *State* v. *Rosalia Realty Co.*, 1 N. J. Super. 94 (App. Div. 1948), *cert. den.* 1 N. J. 602 (1949), the court held a swimming pool within the definition of what a "place of public accommodation shall include" though not specifically enumerated therein. Such a broad interpretation upon a statutory definition utilizing the word "include" has received the approval of this Court. *American Surety Co. of New York* v. *Marotta*, 287 U. S. 513, 517; 53 S. Ct. 260, 261; 77 L. Ed. 466, 468 (1933).

Therefore we submit that the appellant's presentation of the "vagueness" attack upon the New Jersey Law Against Discrimination because of the Fourteenth Amendment of the United States Constitution in a petition for rehearing which was summarily denied without discussion does not qualify within the Supreme Court's jurisdiction over federal questions occasioned by "surprise" interpretations of state laws. *Herndon* v. *Georgia*, *supra*, 444; *Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 366-367; 53 S. Ct. 145, 149; 77 L. Ed. 360, 367 (1932).

The Division raises a further objection to the appellant's right to present the "vagueness" argument against the housing provisions of the New Jersey Law Against Discrimination. N.J.S.A. 18:25-4, 5(k) and 9.1. The Supreme Court of New Jersey has unanimously found that Levitt's operation is clearly covered by the housing provisions of the New Jersey Law Against Discrimination (Jurisdictional Statement 13a). Therefore the New Jersey law does not possess any semblance of vagueness as to Levitt. That corporation seeks to rely upon a possible constitutional objection, if there be any, of others:

It has been an inviolate rule of this Court that it will not concern itself with abstract and hypothetical questions concerning possible constitutional violations against the rights of another. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461; 65 S. Ct. 1384, 1390; 89 L. Ed. 1725, 1734 (1945); *Coleman v. Miller*, 307 U.S. 433, 446; 59 S. Ct. 930, 937; 83 L. Ed. 1385, 1394 (1939); *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 406; 21 S. Ct. 139, 140; 45 L. Ed. 252, 253 (1900). Potential invasions of constitutional rights are not enough to warrant the court's exercise of jurisdiction on appeal. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324; 56 S. Ct. 466, 482; 80 L. Ed. 688, 711 (1936); *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39; 5 S. Ct. 352, 355; 28 L. Ed. 899, 901 (1885). An important corollary to the rule requiring actual cases and controversies to warrant consideration by the United States Supreme Court is the prohibition against a party asserting violation of the constitutional rights of others. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450; 65 S. Ct. 1384; 89 L. Ed. 1725 (1945); *Tyler v. Judges of Court of Registration*, 179 U.S. 405; 21 S. Ct. 139; 45 L. Ed. 252 (1900); *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33; 5 S. Ct. 352; 28 L. Ed. 899 (1885); *Tyson and Brother v. Banton*, 273 U.S. 418; 47 S. Ct. 426; 71 L. Ed. 718 (1927); *Hatch v. Reardon*, 204 U.S. 152; 27 S. Ct. 188; 51 L. Ed. 415 (1907); *Yazoo and Mississippi Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217; 33 S. Ct. 40; 57 L. Ed. 193 (1912); *State v. Bergen County Traction Co.*, 132 N.J. Super. 172, 212-214 (Ch. Div. 1954), *aff'd*, 12 N.J. 468 (1953), *app. dism.* 346 U.S. 909 (1954). Since [illegible] has to be held to be clearly within the [illegible] case of the New Jersey Law Against Discrimination, N.J.S.A. 18:25-1, and presumably within the liberal definition of a publicly assisted housing accommodation, N.J.S.A. 18:25-5(k), [illegible] has no right to assert an objection of vagueness to cause others within the "outer limits" of the law might have their constitutional rights violated.

CONCLUSION

We respectfully submit that the decision of the New Jersey Supreme Court in the [illegible] proceeding is not a final judgment or decree terminating the entire State litigation. For this reason the appeal should be dismissed as premature.

The appellant has not raised a substantial Federal question either of a violation of the Supremacy Clause of the United States Constitution because of its suggested statutory construction or of statutory vagueness contrary to Due Process. The issue of vagueness was not properly presented before the State Courts hence was it ruled upon in the State litigation; in any event the appellant does not have the standing and right to assert this constitutional objection. For these reasons we respectfully submit that the appeal in this matter should be dismissed.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for Division Against Discrimination, Appellee.

On the Brief:

LEE A. HOLLEY,
Deputy Attorney General.

[APPENDICES FOLLOW]

APPENDIX A-1

ORDER OF APPELLATE DIVISION DISMISSING ACTION AND DISSOLVING ORDER TO SHOW CAUSE AND RESTRAINT

This matter coming on to be heard on February 6, 1959 and continued on February 16, 1959, in the presence of Samuel Wolfson, Esq. (Sidney S. Jaffe, Esq., of counsel, appearing), attorney for plaintiffs; David D. Furman, Esq., Attorney General (Thomas P. Cook, Esq., Deputy Attorney General, appearing), attorney for defendant, Division Against Discrimination; Kapelsohn, Lerner, Leuchter & Reitman, Esqs. (Sidney Reitman, Esq., appearing) and Emerson L. Darnell, Esq., attorneys for Willie R. James; Herbert H. Tate, Esq. and Jerome C. Eisenberg, Esq. (Herbert H. Tate, Esq., appearing), attorneys for Franklin Todd, on:

(1) the adjourned return day of an Order To Show Cause why, among other things, an injunctive order should not be issued herein enjoining and restraining the Division Against Discrimination from taking any action in connection with the amended complaint, now pending in the Division Against Discrimination wherein the individual defendants are the complainants and the plaintiffs herein are respondents, from proceeding within the hearing on said amended complaint, and for a stay of said proceedings until the disposition of this action;

(2) the separately filed but similar motions of all defendants, made on due notice to plaintiffs, for, among other things, an order dismissing the within action on the grounds: (a) that this Court has no jurisdiction over the subject matter thereof, such jurisdiction, if any, being vested in the Appellate Division, to be

exercised as provided in R.R. 4:88-8(b); and (b) that, in any event, the within action is not maintainable because plaintiffs have failed to exhaust their administrative remedies before the Commissioner of Education and the Division Against Discrimination under the Law Against Discrimination (R.S. 18:25-1 et seq.), as required by R.R. 4:88-14;

and it appearing to the Court, after having duly heard and considered the matter, including the briefs and arguments of counsel, that plaintiffs' complaint and action cannot be entertained or maintained in this court because: (1) this Court is without jurisdiction over the subject matter of the action, such jurisdiction, if any, being vested in the Appellate Division, to be exercised as provided in R.R. 4:88-8(b); and (2) because, in any event, plaintiffs have failed to exhaust their administrative remedies before the Commissioner of Education and the Division Against Discrimination under the Law Against Discrimination (R.S. 18:25-1 et seq.), as required by R.R. 4:88-14; and good cause appearing for the making of this order,

It is on this 16th day of February, 1959 ORDERED that the complaint and action in the above entitled cause be and the same are hereby dismissed;

It is further ORDERED that the order to show cause heretofore issued as aforesaid, and the restraint and stay therein imposed and continued from time to time pending the return of said show cause order, be and the same are hereby dissolved.

SCHALICK
J. S. C.

The form only of the within order is approved.

Sidney S. Jaffe, Esq. of counsel with Samuel Wolfson, Esq., attorney for plaintiffs

APPENDIX A-2

(Order of Appellate Division for Stay, etc.)

Plaintiffs-appellants having moved this Court for an order staying the performance and enforcement of the order appealed from heretofore entered on February 19, 1959, in the Law Division of the Superior Court and further proceedings in defendant-respondent, Division Against Discrimination in the State Department of Education wherein defendants-respondents, Willie R. James and Franklin D. Todd, are complainants and plaintiffs-appellants, Levitt and Sons, Incorporated and William J. Levitt, are respondents; and

The Court, on its own motion, having decided to consider the within appeal also as a request by plaintiffs-appellants for leave to appeal to this Court from the setting down for hearing by defendant-respondent, Division Against Discrimination in the State Department of Education, before it the matter of the amended complaints filed by said defendants-respondents, Willie R. James and Franklin D. Todd, in the proceedings aforesaid, with leave granted for such appeal, so that the merits of the complaint filed by these plaintiffs-appellants in the Law Division of the Superior Court may be determined by this Court in this appeal;

It is, on this 16th day of March, 1959, Ordered:

1. The performance and enforcement of the said order entered in the Law Division of the Superior Court and the proceedings before defendant-respondent, Division Against Discrimination in the State Department of Education, be and the same are hereby stayed pending a determination and disposition of this appeal.

2. Further depositions, if any, to be taken by any of the parties hereto, shall be completed by March 23, 1959.

3. The brief of plaintiffs-appellants, on the merits aforesaid, shall be served and filed with the clerk of this court by March 23, 1959.

4. The briefs of defendants-respondents, on the merits aforesaid, shall be served and filed with the clerk of this court by April 1, 1959.

5. Argument of this appeal is set down for April 6, 1959, at a place to be announced by the Court.

FOR THE COURT

HAROLD A. PRICE,
SJAD

I hereby consent to the form of the foregoing order.

JULIUS WILDSTEIN
Of counsel with Defendants-Respondents

APPENDIX B

To The Honorable Chief Justice and Associate Justices of The Supreme Court of New Jersey:

The defendant-respondent, Division Against Discrimination in the Department of Education of the State of New Jersey, seeks leave to stay this proceeding on appeal to this court and to permit the Division Against Discrimination to conduct hearings and make final determinations in the cases of *Yuther Gardner* v. *Green Fields Farm, Inc.*, H8-4R, *Franklin D. Todd* v. *Levitt and Sons, Incorporated*, H3-12R, and *Willie R. James* v. *Levitt and Sons, Incorporated*, H3-13R, presently pending before that agency upon the verified complaints of Yuther Gardner filed on December 3, 1957 and amended on September 23, 1958, Franklin D. Todd filed on June 30, 1958 and amended on October 20, 1958, and Willie R. James filed on July 9, 1958 and amended on October 20, 1958. Reasons in support of this motion are expressed in the brief annexed hereto.

DAVID D. FURMAN
Attorney General of New Jersey
By: DAVID M. SATZ, JR.
Deputy Attorney General

DATED: October 26, 1959

APPENDIX C

SUPREME COURT OF NEW JERSEY

DOCKET NO. 2983

LEVITT AND SONS, INC.,

Plaintiff-Appellant,

vs.

DIVISION AGAINST DISCRIMINATION, et al.,

Defendants-Respondents.

On MOTION TO PERMIT AGENCY PROCEEDINGS TO CONTINUE.

This matter having been duly presented to the Court, it is Ordered that part of the motion seeking leave to proceed with the hearings before the Division against Discrimination is granted. That portion of the motion which sought stay of the appeal is denied.

The brief of the appellant is to be filed by November 20th; briefs of the respondents by December 11th; reply brief, if any, by December 16th; the argument will be scheduled for December 21st.

Witness, the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton, this second day of November, 1959.

JOHN H. GILDEA,
Clerk.

FILED
Nov. 2, 1959
JOHN H. GILDEA,
Clerk

APPENDIX D

SUPREME COURT OF NEW JERSEY
DOCKET NO. 2983

LEVITT AND SONS, INC.,

Plaintiff-Appellant,

vs.

DIVISION AGAINST DISCRIMINATION, et al.,

Defendants-Respondents.

The plaintiff-appellant having filed a notice of appeal to the Supreme Court of the United States, it is ORDERED that the Mandate of this Court be held for a period of 60 days.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton, this fifteenth day of February 1960.

JOHN H. GILDEA,
Clerk.

APPENDIX E

MOTION FOR ORDER FURTHER HOLDING MANDATE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey:

Plaintiff-Appellant, Levitt and Sons, Incorporated, respectfully moves this Court for an order further holding the mandate of this Court until the United States Supreme Court finally disposes of this case on plaintiff-appellant's appeal to that Court. The grounds in support of this motion are set forth in the accompanying statement and supporting brief and the affidavit of Ira G. Goldman.

PITNEY, HARDIN & WARD,
By WILLIAM P. REISS,
Attorneys for Appellant,
Levitt and Sons, Incorporated.

Dated: April 8, 1960

APPENDIX F

SUPREME COURT OF NEW JERSEY

DOCKET NO. 2983

LEVITT AND SONS, INC.,

Plaintiff-Appellant,

vs.

DIVISION AGAINST DISCRIMINATION, et al.,

Defendants-Respondents.

ON MOTION TO HOLD MANDATE

This matter having been duly presented to the Court, it is Ordered that the mandate of this Court be held until June 30, 1960.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this eleventh day of April 1960.

JOHN H. GILDEA
Clerk

FILED
Apr. 11, 1960

JOHN H. GILDEA
Clerk

APPENDIX G

SUPREME COURT OF NEW JERSEY

No. M182 SEPTEMBER TERM 1959

LEVITT AND SONS, INC.,

Plaintiff-Appellant,

vs.

DIVISION AGAINST DISCRIMINATION, et al.,

Defendants-Respondents.

ON PETITION ORDER

This matter having been duly considered by the Court, it is ORDERED that the motion for leave to file a petition for rehearing out of time is granted.

No Justice who voted with the majority having moved a reconsideration the petition for rehearing is denied.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton this eighth day of April 1960.

JOHN H. GILDEA
Clerk